

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be argued by:
Arthur A. Chalenski, Jr.
Estimated Time: 30 Minutes

Docket No. 77-1129

In The
United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

— v. —

RAYMOND D. MASCIARELLI
and
LAWRENCE SCHULTZ,

Defendants-Appellees.

On Appeal from the United States District Court
Northern District of New York

BRIEF FOR APPELLANT,
United States of America

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Defendants-Appellees.

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BRIEF FOR APPELLANT,
United States of America
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STATEMENT OF THE ISSUES

- I. Whether a further court order is required under Title III to disclose a wire communication that is relevant to the crimes specified in the order authorizing the intercept and which also relates to another offense not specified in the order.
- II. Whether disclosure of wire communications relating to an offense other than that specified in the order of authorization is authorized and approved by bringing such communi-

cations to the issuing judge's attention followed by his permitting the interception to continue and by his issuing yet a subsequent intercept order involving the same investigation and subjects.

- III. Whether the disclosure order requirement of Title 18, United States Code, Section 2517(5) applies to grand jury presentations.
- IV. Whether dismissal of the indictment is an appropriate remedy where wire communications are unlawfully disclosed to a grand jury.

PRELIMINARY STATEMENT

The United States of America appeals from a pre-trial order dismissing the Indictment. The Order was entered on November 11, 1976 in the United States District Court for the Northern District of New York by The Honorable Edmund Port, United States District Judge (App. 10)

The one-count indictment was filed on November 18, 1974. The indictment charges that from about April 12, 1974 to about April 24, 1974, the defendant Masciarelli was engaged in the business of betting and wagering, and that both defendants utilized a telephone to transmit wagering information in interstate commerce from Munroe Falls, Ohio to Binghamton, New York, in violation of Title 18, United States Code, Sections 2 and 1084(a). The defendants both made motions to suppress the

results of intercepted telephone communications and to dismiss the indictment. On November 9, 1976 argument was heard on the motion on which date the United States District Judge dictated his decision on the record (App. 38 to 45).

STATEMENT OF FACTS

During the period from March 7 through May 13, 1974, the Government engaged in five telephone wiretaps in the course of an investigation of illegal gambling in the Binghamton, New York area. Three wiretap orders were obtained authorizing the five wiretaps. (See Affidavit, Application, and Order, in respective Files MP-15, MP-16, and MP-17, Appendix 47 to 161). On April 11, 1974, the Honorable Edmund Port issued the second wiretap order in MP-16, authorizing the Federal Bureau of Investigation to install a wiretap on telephone number 607-724-5301 located at 229 Chenango Street, Binghamton, New York. Judge Port found that there was probable cause to believe that the defendant Masciarelli, and other named persons, were using the specified telephone to conduct an illegal gambling business and conspiracy to do so, in violation of Title 18, United States Code, Sections 1955 and 371, respectively. (App.113)

The wiretap pursuant to this second Order was conducted from April 11 through April 25, 1974. During the course of this wiretap the Government overheard a few conversations in which "line" information was furnished by the defendant Schultz, located in Ohio, to the defendant Masciarelli, located in New York. One of these interstate conversations was set forth in a Fifth Day Report submitted to The Honorable Edmund Port on April 16, 1974. (App. 117 at 121).

Evidence resulting from the five wiretaps, including the interstate telephone call between the defendants Masciarelli and Schultz, was presented to the grand jury. (App. 20 to 23). On November 18, 1974, the grand jury returned the indictment in the instant case against Masciarelli and Schultz for violating 18 U.S.C. §1084, which involves the interstate transmission of wagering information. On the same date the grand jury indicted Masciarelli and nine co-defendants in a separate indictment, with conducting an illegal gambling business and conspiracy so to do, in violation of 18 U.S.C. §§1955 and 371. (App. 8 and 9).

It was stipulated that the interstate conversations between the defendants Masciarelli and Schultz which were presented to the grand jury were pertinent evidence of the statutes named in the intercept orders, 18 U.S.C. §§1955 and 371, as well as being pertinent evidence of the charge in the instant case,

18 U.S.C. §1084, and that one grand jury heard all of the wiretap evidence (App. 21).

The defendants Masciarelli and Schultz both moved to dismiss the indictment and to suppress the wiretap evidence based on United States v. Brodson, 528 F.2d 214 (7th Cir. 1975) and United States v. Marion, 535 F.2d 697 (2d Cir. 1976). (App. 11 to 13 and 14). In dismissing the Indictment, the United States District Judge stated that "as a subordinate judge, I am bound by the Second Circuit, so that it is foolish for me to speculate about what my thoughts might be or even what my rulings might be if the situation were handed to me as an initial or virgin presentation." (App.30 to 31 see also App. 39).

ARGUMENT

POINT I

A WIRE COMMUNICATION THAT IS RELEVANT TO THE CRIME SPECIFIED IN THE ORDER AUTHORIZING THE INTERCEPT AND WHICH RELATES AS WELL TO ANOTHER OFFENSE NOT SPECIFIED IN THE ORDER MAY THEREAFTER BE DISCLOSED WITHOUT FURTHER COURT ORDER

The defendants rely on United States v. Brodson, 528 F.2d 214 (7th Cir. 1975) and United States v. Marion, 535 F.2d 697 (2d Cir. 1976)* for authority that wire interceptions of interstate calls

* See also United States v. Campagnuolo, No. 76-1305 (5th Cir., Argued Dec. 16, 1976) for case involving similar issues.

relating to the transmittal of line information may not be disclosed to the grand jury or the court at trial without having first obtained a disclosure order under 18 U.S.C. §2517(5). For the reasons hereinafter stated, both the Brodson and the Marion decisions interpreted Section 2517(5) in an unreasonable manner that will have a disruptive effect on law enforcement and they should not be followed.

- A. TITLE 18, U.S.C. §2517(5) IS NOT APPLICABLE TO THE INSTANT CASE SINCE THE GRAND JURY WAS INVESTIGATING AN OFFENSE DESCRIBED IN THE WIRETAP ORDER AS WELL AS AN UNSPECIFIED OFFENSE.
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Title 18, U.S.C. §2517(5) provides that wire interception evidence consisting of communications "relating to offenses other than those specified in the order of authorization" may be used without additional judicial approval if the use comes within Subsections (1) and (2) of Section 2517, but that such communications may be used under Subsection (3) only "when authorized or approved by a judge of competent jurisdiction." Subsection (3) of Section 2517 does not employ the term "use". Instead, it relates only to disclosure as follows:

Any person who has received ... any information concerning a wire or oral communication ... intercepted in accordance with the provisions of this chapter may disclose the contents of that communi-

cation ... while giving testimony under oath or affirmation in any proceedings held under the authority of the United States (Emphasis supplied)

The issue, then, is whether this language means that an Order must be secured whenever the theory of the criminal prosecution changes, or whether it means that an Order must be secured when the original seizure is of evidence not within the scope of the Order. The language is ambiguous, but it is clear that Congress intended the language to apply to the situation where the Government, in the course of an authorized interception, overhears unexpected conversations that relate to crimes which are not set forth in the intercept order.

That Congress could not have intended the language to be construed as held in Brodson and as suggested in Marion is made patently obvious by the facts of the instant case. Here the intercepted communications relate to the crime specified in the wiretap order and were disclosed to a grand jury investigating that very crime. That the grand jury investigation of that crime was not a subterfuge is made clear by the fact that the grand jury did, in fact, indict the defendant Masciarelli for violating 18 U.S.C. §§1955 and 371, the crimes specified in the wiretap orders. (App. 6). Hence, there was clearly

an offense which was "specified in the order of authorization" to provide a basis for the "disclosure" within the meaning of Section 2517(3).^{*} Where the disclosure was proper the court should not have reached the question of whether the disclosure also related to another offense. See, Fleming v. United States, 547 F.2d 872 (5th Cir. 1977).

Since there was a disclosure relating to the offenses specified in the order of authorization, Section 2517(5) does not even come into play and there is accordingly no violation of Section 2517(5) involved in the presentation of the intercepted communications to the grand jury and the decision should be reversed on this ground alone.^{**}

^{*} Section 2517(5) contains the phrase "used under subsection (3)". The employment of "used" in subsection (5) thus relates only to "disclosure" as set forth in subdivision (3) and would not provide an independent basis for holding as unlawful the use of the evidence by the grand jury in returning an indictment on a different crime after a lawful disclosure.

^{**} While the government submits that this ground alone warrants reversal, to do so without considering the points set forth hereinafter may constitute a hollow victory. The question would still be left open as to whether the intercepted communications could be disclosed at the trial of the instant case (which would not relate to the Section 1955 and 371 offenses) without first obtaining the authorization set forth in Section 2517(5). This point has already been raised, since the defendants both requested suppression of the intercepted communications in their motions (App. 12 and 14). We suggest that because of the present age of this case and the likelihood of another appeal should a limited ground be relied on for reversal, consideration of the additional points raised in this brief is appropriate.

B. SUBSECTION 2517(5) IS A STATUTORY
SUBSTITUTE FOR THE "PLAIN VIEW"
RULE FOR ELECTRONIC SURVEILLANCE

A search warrant authorizes searches for and seizure of only the items specified in the warrant. If police come upon incriminating evidence during the course of a search, it cannot be seized under the authority of the warrant. The "plain view" doctrine, however, independently permits the warrantless seizure of incriminating evidence discovered during the course of a lawful search. Coolidge v. New Hampshire, 403 U.S. 443, 465-472 (1971).

Congress created an analogous "plain view" rule for electronic surveillance in Section 2517(5). It enacted Section 2517(5) to specifically permit the introduction as evidence of incriminating conversations wholly unrelated to the offenses enumerated in the wiretap order.* Thus, the plain view rule enacted by Section 2517(5) serves to supplement the wiretap order and permits the use at trial of intercepted

* In Section 2517(5), Congress also enacted a statutory safeguard which is not found in conventional search warrant law. It required a disclosure order before conversations intercepted under its plain view rule could be used in certain proceedings, namely those encompassed by subsection (3) of section 2517 (See Argument III, infra). Congress did not require a disclosure order when such conversations are used under subsection (1), which permits the disclosure of intercepted communications to other law enforcement officers, or under subsection (2), which permits law enforcement officers to use intercepted communications to the extent such use is appropriate in the performance of their official duties.

conversations not related to offenses specified in the original wiretap order and seizable under it. Cf. Coolidge v. New Hampshire, supra, 403 U.S. at 466. See United States v. Eisner, 297 F.2d 595, 597-598 (6th Cir. 1962), cert. denied, 396 U.S. 859, (cited in the legislative history of Section 2517(5), S.Rep. No. 1097 90th Cong. 2nd Sess., 1968 U.S. Code Cong. & Ad. News 2112, 2189;* United States v. Sklaroff, 323 F. Supp. 296, 307 (S.D. Fla. 1971) conviction affirmed, 506 F.2d 837 (5th Cir. 1975), cert. denied, 423 U.S. 874.

Where conversations not within the scope of the wiretap order are seized, Congress also provided in Section 2517(5) that they could only be used in evidence when a judge finds that the conversations were "otherwise intercepted in accordance" with Title III. The government's application for a disclosure order is required to include a showing that the wiretap order was not a subterfuge for the interception of the conversations relating to unspecified offenses and that the conversations were "in fact incidentally intercepted during the course of a lawfully executed order." S. Rep. No. 1097, supra, at 2189. This post-interception procedure

* All references to S. Rep. 1097 in this brief are to the reprint of the report in 1968 U.S. Code Cong. & Ad. News. Hereinafter, this report will be cited as follows: S. Rep. 1097, supra, followed by the appropriate page.

is a safeguard which acts as a check against abuse of the plain view doctrine in the sensitive area of electronic surveillance.

Thus, where the intercepted communications relate to the offenses specified in the original wiretap order, they are seized pursuant to that order, and neither the plain view doctrine nor the analogous disclosure order requirement of Section 2517(5) is implicated. Manifestly, there is no need in such circumstances for a disclosure application and order to insure that the plain view provision of Section 2517(5) was not abused, since the plain view doctrine was not involved in the interception. United States v. Moore, 513 F.2d 485, 500-503 (D.C. Cir. 1975).^{*} See also United States v. Daly, 535 F.2d 434, 439-440, (8th Cir. 1976).

* The Court in Moore suggested that Congress by its language, "relating to offenses other than those specified in the order of authorization," only requires court authorization where communications are intercepted concerning a type of crime substantially different from the one for which the intercept authority was granted. 513 F.2d at 502 n.51. Although Moore involved the D.C. wiretap statute, Congress used the same operative language in enacting both the D.C. and the federal statutes. See also United States v. Grant, 462 F.2d 28, 33 (2d Cir.), cert. denied, 409 U.S. 914 (1972), in which this Court held that authorization under a state wiretap statute to monitor for evidence of "larceny" in violation of New York law was sufficient to allow the interception of conversations dealing with violations of federal securities fraud and mail fraud laws.

While the results occasioned by the analysis adopted in Moore, are correct, the Government urges here a somewhat different construction of Section 2517(5) -- one that is consistent with the "plain view" rule employed in conventional search and seizure cases.

The wiretap order in this case authorized the interception of communications relating to the conducting of an illegal gambling business in violation of 18 U.S.C. §1955. Although it was stipulated in the instant case that the intercepted interstate wire communications related both to Section 1955 and to the statute charged in the instant case, 18 U.S.C. §1084, it will be helpful to set forth the degree to which the statutes overlap. In order to prove a violation of Section 1955, the government had to establish that the gambling business was conducted in "violation of the law of a State." Section 1955(B)(1)(i). Therefore, the wiretap order also authorized interception of communications relating to Article 225 of the New York State Penal Law. The interstate conversations during which line information was disseminated, and which are at issue here, were in and of themselves substantive violations of Section 225.05 of the New York State Penal Law which prohibits the knowing advancing or profiting from unlawful gambling activity. These conversations were also probative evidence of a violation of 18 U.S.C. §1955, because of the necessary role of line information in a gambling business; they may also help establish that the gambling business involved five or more persons, because the line source may be helping to conduct the business. United States v. Schaefer, 510 F.2d 1307, 1311-1312 (8th Cir. 1975), cert. denied, 421 U.S. 978:

United States v. Ceraso, 467 F.2d 653, 656 (3rd Cir. 1972).

Accordingly, the intercepted communication which was disclosed to the jury in the instant case clearly related to the crimes designated in the order of authorization. To hold that such communications cannot be disclosed without further court order ignores the "plain view" doctrine on which Section 2517(5) is premised, and bypasses the clear mandate of that section -- which provides that it is the lack of the relationship between the interception and the crimes specified in the enabling warrant that triggers the applicability of the statute. As best exemplified by the facts of the instant case, it is not the use of the seized evidence which should be examined, but the circumstances at the time of the seizure.

The shifting of the focus from the legality of the seizure to the later decision on the theory of prosecution is contrary to the review conducted in the conventional search and seizure cases and imputes to Section 2517(5) a meaning unsupported by its language or legislative history. Indeed, the first sentence of Section 2517(5) speaks only in terms of "intercepting", not in terms of a subsequent use. It is this sentence alone that defines what communications require a subsequent order for disclosure. To require the government to apply for a disclosure order under Section 2517(5) when, as here, the interception of

the communication was not inadvertant is necessarily to remove from the scope of the reviewing court's function -- contrary to Congress' explicit intention -- any genuine consideration of whether the interception " was otherwise intercepted in accordance with the provisions of [Title III]" (Section 2517(5))*.

* Congress has said that an application for such an order ordinarily "would include a showing that the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order." S. Rep. No. 1097, supra, at 2189.

C. THE CRIME OF INTERSTATE TRANSMISSION
OF WAGERING INFORMATION IS ENCOMPASSED
WITHIN THE CRIME OF CONDUCTING AN
ILLEGAL GAMBLING BUSINESS AND IS NOT
A SEPARATE OFFENSE WITHIN THE MEANING
OF 18 U.S.C. §2517(5).

In Marion, supra, the panel majority expressly followed the Seventh Circuit in Brodson, supra, and reversed a conviction because of failure to obtain judicial authorization under Section 2517(5). The holding of Marion, however, is that the federal crime of interstate transportation of an unregistered firearm was sufficiently different from the state crime of possession of a dangerous weapon to be an "other offense" within the meaning of Section 2517(5). The panel majority conceded, however, that some other crimes, although they may contain different elements, might nonetheless be "sufficiently similar to obviate any need for §2517 approval" (535 F.2d at 704, n. 13) or "so closely related as to obviate the need for subsequent judicial approval". (535 F.2d at 705).

It is difficult to imagine how two crimes can be more closely related than the conducting of "an illegal gambling business" under Section 1955, and the obtaining of wagering information to further "the business of betting or wagering" under Section 1084(a). Not only is the proof of a violation

of Section 1084(a) also proof of a violation of Section 1955 as set forth in more detail in Point IB, *supra*, but with the addition of only the jurisdictional element of an "interstate" wire transmission, a violation of Section 1955 would have all of the elements required to support a violation of Section 1084(a).

Moreover, the panel majority opinion in Marion, *supra*, is in conflict with the clear implications of earlier, pertinent decisions of the Second Circuit with respect to what constitutes "offenses other than those specified in the order of authorization" within the meaning of Section 2517(5). In United States v. Tortorello, 480 F.2d 764 (2d Cir. 1973), cert. denied, 414 U.S. 866 (1974), the execution of a New York State eavesdropping warrant, which authorized the interception of communications relating to the offense of Grand Larceny, resulted in the seizure of conversations relating to criminal violations of the anti-fraud and registration provisions of the federal securities laws. Without obtaining a disclosure order pursuant to 18 U.S.C. §2517(5), federal authorities subsequently used the state-obtained wiretap evidence to secure Tortorello's indictment and conviction for the federal securities frauds and registration violations. The Second Circuit affirmed.

In so doing, the Court rejected Tortorello's claim that

there had been a failure to amend the New York eavesdropping warrants, as assertedly required, to include reference to the securities fraud offenses for which he was indicted by a federal grand jury. It found, instead, that the pertinent provisions of New York State Law -- Section 825.4 (now N. Y. Crim. Pro. Law §700.65 of the New York Code of Criminal Procedure) -- and the counterpart federal provisions, 18 U.S.C. §2517(5), were "substantially identical," 480 F.2d at 782, that the New York State provisions were "controlling" (ibid), and that, for two distinct and independent reasons, those provisions had been fully complied with.

First, the Court found that if the disclosure to a federal grand jury of the communications intercepted by state authorities required some sort of post-interception judicial approval, the latter had been provided by the renewal and extension orders for the warrant -- entered by the issuing justice after he had reviewed the state's application papers in support of the renewals, which evidenced the earlier interception of communications relating to the federal offenses. 480 F.2d at 781-782. (See Point II, *infra*, for the relation of this argument to the instant case).

Second, the court, in Tortorello, agreed with the

government's contention that there was no need to amend the original order, since the federal crime of stock fraud was not "totally unrelated" to, and indeed was "encompassed" by, the crime for which the warrant had been issued -- namely, Grand Larceny. 480 F.2d at 782-783, and n.16. In support of that view, the Court relied on its earlier holding in United States v. Grant, 462 F.2d 28, 33 (2d Cir. 1972), to much the same effect. 480 F.2d at 783 and n. 17.

Given the foregoing, the conclusion that no amendment or subsequent judicial approval was required here prior to the federal use of the wiretap evidence in issue is compelled a fortiori. In Tortorello, state authorities intercepted communications which at least arguably did not relate to the crimes specified in the respective orders. Here there is not and could not be any such claim; there simply was no "interception of evidence not authorized by the original order," United States v. Tortorello, supra, 480 F.2d at 783, (emphasis added), and, accordingly, no further amendment or subsequent judicial approval was required.

The reliance upon Brodson by the panel majority in Marion, supra, is not justified. In Brodson, supra, the Seventh Circuit affirmed the District Court's order dismissing an indictment on the ground that the government's application

for a disclosure order pursuant to 18 U.S.C. §2517(5) was untimely. The Brodson court, however, failed to come to grips with the issue of whether a disclosure order was required at all. It simply stated, without further illuminating its conclusion by reference to any authorities, that "[t]he controlling factor here, however, is not the dissimilarity of the offenses, but the fact that the government ... did not comply with the mandate of Section 2517(5)." 528 F.2d at 215. But, by its very terms, the mandate of Section 2517(5) only applies where the communications seized relate "to offenses other than those specified in the" intercept order. Thus the dissimilarity of the offenses is exactly the factor which is controlling. Where the conversation seized relates simultaneously to crimes specified in the authorizing warrant and others that are not, Section 2517(5) does not require a disclosure order. United States v. Moore, supra, 513 F.2d at 500-503.

Finally, it is not entirely clear how the view of the panel majority in Marion, or that of the Seventh Circuit in Brodson, would genuinely further and protect any privacy interests. There has been, of course, no privacy interest violated in the instant case where the grand jury heard the intercepted communications during its Section 1955 investigation. Nor would such privacy interests be served, for example, in a case where the execution of a state

eavesdropping order leads to the wholly proper seizure of a communication related to one of the state offenses specified in the initial order, the communication is then introduced at a public state trial for that very offense, and some time thereafter federal authorities wish to use that recorded conversation in a criminal prosecution for a related, though distinct, federal offense. Despite the earlier public disclosure, the government, in the view of the panel majority, would have to obtain further judicial approval before using the same conversation in the federal proceeding. See also Fleming v. United States, supra, 547 F.2d at 874.

POINT II

THE DISCLOSURE OF THE INTERSTATE TELEPHONE CALLS WAS AUTHORIZED AND APPROVED IN THE INSTANT CASE

The wiretap Order was dated April 11, 1974 in the instant case. On April 16, 1974, a Fifth Day Report related to the order was submitted to The Honorable Edmund Port by the United States Attorney. (App. 117).* Paragraph 6 of the Fifth Day Report provided as follows:

* The purpose of the Fifth Day Report, in part, is to show the Judge the "need for continued interception". [18 U.S.C. §2518(6)].

One particular conversation from telephone number 724-5301 was placed to telephone number 1-216-688-1827 at Munroe Falls, Ohio, in the vicinity of Akron, Ohio, where the speaker who had identified himself as "RAY" discussed his line information from Akron, Ohio. In the conversation a fee was discussed of \$135.00 a month or \$25.00 a week. "RAY" indicated he would purchase his line by the month at \$135.00 a month and indicated that he would use the name "RAY MILLS" when obtaining his line information from that Akron, Ohio telephone number. The speaker at the other end indicated that "RAY" should send his money to Post Office Box 2705, Akron, Ohio, for this line information. As a result of the intercepts on 729-1401, fourteen new code names have been heard in use. The thirteen names have been heard being used on the 724-5301. (App. 121).

The person identified as "Ray" as quoted above, is the defendant Masciarelli and the speaker at Akron, Ohio is the defendant Lawrence Schultz.

Moreover, on May 3, 1974, Judge Port issued the third and last order in this case (App. 157). This Order indicates affirmative action on the part of the court in approving the continuation of the wiretapping of subjects in the illegal gambling business.*

In the opinions in United States v. Moore, 513 F.2d 485 (D.C. Cir. 1975); United States v. Marion, 535 F.2d 697, 535 F.2d 697 (2d Cir. 1976), and United States v. Tortorello,

* While the telephones intercepted were different, the Affidavit of Robert R. Hazelwood of May 3, 1974 (App. 123) makes clear that the gambling business and subjects were the same as previously covered by the wiretap Order in MP-16.

480 F.2d 764 (2d Cir. 1973), the principle of judicial approval of disclosure by subsequent authorization is recognized. The court in Moore stated as follows:

In any event, even if we were to hold that disclosure of evidence concerning the D.C. Code offenses to the FBI somehow transformed the interception into one "relating . . . to offenses other than those specified in the order of authorization," we would hold that the requirement of court authorization for such use was met in this case. In the application for each wiretap, the judge issuing the authorization was informed of the fact that the gambling investigation was being conducted jointly by the Metropolitan Police and the FBI, and each court order explicitly authorized the Metropolitan Police to disclose the information obtained from the surveillance to the FBI. Although we would have substantial reservations about the propriety of such "prior" compliance with 23 D.C.Code §548(b) if it were used to circumvent court approval in situations where the evidence obtained from the surveillance was different from that contemplated by the judicial order, this is not such a case. Chief Judge Greene and Acting Chief Judge Belson were fully aware of the fact that the FBI was participating in the investigation, and they could fully appreciate the fact that the federal offenses being investigated were integrally related to, though not identical with, the D.C.Code offenses for which they issued wiretap orders.

See also, Marion, supra, p. 702 and footnote 14 at 704; and Tortorello, supra, 781-783.

Pursuant to the aforementioned cases, the Fifth Day Report notified the judge that interstate telephone calls

were being intercepted (which put him on notice that the jurisdictional element of Section 1084(a) was satisfied) and both because he permitted the then-installed interception to continue and because he authorized a subsequent wiretap in the same investigation, the requirement of judicial authorization and approval under 18 U.S.C. §2517(5) was met in this case and the presentation of the intercepted interstate communications would be proper in "any proceedings" and before a federal grand jury.

POINT III

THE DISCLOSURE ORDER REQUIREMENT OF SECTION 2517(5) DOES NOT APPLY TO GRAND JURY PRESENTATIONS

There is another independent reason why the disclosure order requirement of Section 2517(5) should not apply in this case. As noted above, the disclosure order requirement of Section 2517(5) applies only to the evidentiary use of intercepted conversations in a Section 2517(3) forum -- i.e., in "any proceeding held under the authority of the United States." While the term "any proceeding" is undeniably broad enough to include grand jury presentations had Congress so intended, this was clearly not the Congressional purpose. Indeed, if the words standing alone were dispositive, the question should be decided in the favor of the government inasmuch as Congress itself has said that the same words,

appearing in a different section of Title III -- 18 U.S.C. §2518(9) -- do "not include a grand jury hearing." S. Rep. No. 1097, supra, at 2195; accord, Petition of Leppo, 497 F.2d 954, 956 (5th Cir. 1974). However, in order to determine exactly what Congress did intend by enacting Section 2517(3) it is necessary to examine the pertinent legislative background.

As originally enacted in 1968, Section 2517(3) expressly included grand jury proceedings; it applied "in any criminal proceeding in any court of the United States ... or in any Federal ... grand jury proceeding." An examination of the pertinent legislative history, however, makes clear that the reference to grand juries in Section 2517(3), as it was originally cast, was at best ambiguous and at worst misleading. The Senate report accompanying the passage of Title III explained with respect to Section 2518(10)(a):

Paragraph(10)(a) provides that any aggrieved persons, as defined in section 2510(11), discussed above, in any trial hearing or other proceeding in or before any court, department, officer, agency, regulating body or other authority of the United States, a State, or a political subdivision of a State may make a motion to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom. This provision must be read in connection with sections

2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. Because no person is a party as such to a grand jury proceeding, the provisions does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. Blue v. United States, 86 S.Ct. 1416, 384 U.S. 251 (1966). There is no intent to change this general rule. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding. S. Rep. No. 1097, supra, at 2195.

To the extent that the panel majority in Marion and the Court in Brodson found support for a contrary view in 18 U.S.C. §2515,* such reliance was misplaced. Section 2515 simply articulates the general rule of exclusion to be applied once it has been determined that the evidence in issue was obtained in violation of the provisions of Title III. It leaves to other sections the threshold question of which interceptions and disclosures are unlawful, and it must "be read in light of Section 2518(10)(a) ... which defines the class entitled to make a motion to suppress." S. Rep. No. 1097, supra, at 2185.

* 18 U.S.C. §2515 provides in pertinent part: Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial ...or before any...grand jury...of the United States...if the disclosure of that information would be in violation of this chapter.

The Senate commentary accompanying Sections 2517(2) and (3) is likewise enlightening, and further evidences the express lack of any Congressional intent to limit the character of evidence that may be presented to a grand jury.

Section 2517(2) permits an investigative or law enforcement officer to use all intercepted conversations "to the extent such use is appropriate to the proper performance of his official duties." No disclosure order is required by Section 2517(5) for communications used within the meaning of that subsection. The Senate report gives as examples of such use the obtaining of arrest and search warrants; it also gives one additional example: the use of intercepted conversations "to develop witness." S. Rep. No. 1097, supra, at 2188. Two cases are cited after this example; both involve grand jury proceedings. One of these cases, New York v. Saperstein, 2 N.Y. 2d 210, 213, 140 N.E. 2d 252, 253 (1957), involved a defendant's refusal to answer questions regarding "telephone conversations which had been wire-tapped and the recordings of which were read to the defendant before the Grand Jury." On the other hand, the examples in the report on Section 2517(3) all relate to the use of intercepted conversations "at trial." S. Rep. No. 1097, supra, at 2188. New York v. Saperstein, supra, is cited as an example of the use of

intercepted conversations "to establish guilt directly."
Id. In that case, the defendant was convicted of contempt for refusing to answer questions at the grand jury, and the recorded conversations were used at trial. 140 N.E. 2d at 254. Against this background, it appears reasonable that Congress, despite its language, never actually intended grand jury proceedings to be included in Section 2517(3). There is considerable support for this conclusion in the 1970 amendment to Section 2517(3).

When amended in 1970, the clause relating to grand jury proceedings was eliminated from Section 2517(3).^{*} By that revision, Congress made transparently clear that it did not mean to include disclosures in ex parte grand jury proceedings within the purview of Section 2517(3). In addition to enacting new criminal offenses, Title IX of the Organized Crime Control Act of 1970 provided civil remedies for organized crime activities. 18 U.S.C. §1964. It was therefore necessary to amend Section 2517(3) because, at that time, it permitted wiretap evidence to be used only at "criminal proceedings." Title IX of the Organized Crime Control Act was derived

^{*} Section 902(b) of Title IX, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 947

from an earlier bill, S. 1861, 91st Cong., 1st Sess. (1969). See S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969). Section 2(a) of S. 1861 contained, inter alia, the civil remedies. Section 3(b) of S. 1861 contained the amendment of 18 U.S.C. 2517(3) to allow use of intercepted conversations at the civil trials; it would have amended Section 2517(3) only by striking the word "criminal" from it, thereby leaving the grand jury clause in the subsection. See reprint of S. 1861 in Hearings on S. 30, et al., Subcommittee on Criminal Laws and Procedures of the Senate Committee on Judiciary, 91st Cong., 1st Sess. 61, 68-69, 82 (1969). However, when the Senate Judiciary Committee incorporated S. 1861 as the new Title IX of the bill later enacted, it eliminated the grand jury clause completely, in addition to eliminating the word "criminal." S. Rep. No. 91-617, supra, p. 28. Moreover, lest that deletion be thought inadvertent, the committee proposed and Congress enacted Section 904(c)(1) of Title IX (which was not part of S. 1861) which reads, in pertinent part, as follows (84 Stat. 947-48; Note to 18 U.S.C. §1961):

Nothing contained in this title shall
impair the authority of any attorney
representing the United States to -

- (1) lay before any grand jury ... any
evidence concerning any alleged
racketeering violation of law.

The elimination of grand jury proceedings from the disclosure order requirement was wholly consistent with one of the main purposes of the Organized Crime Control Act -- to strengthen the grand jury as one of the tools against organized crime. See Statement of Findings and Purpose, 84 Stat. 922-923, note to 18 U.S.C. 1961. To that end, various titles of the Act provided for calling of special grand juries, witness immunity, punishment of recalcitrant witnesses, and prohibition of false declarations. See 84 Stat. 922, et seq. It was also consistent with long tradition that "the grand jury has been accorded wide latitude to inquire into violations of criminal law." United States v. Calandra, 414 U.S. 338, 343 (1974).

In sum, the Government respectfully submits that to construe Section 2517(5) and its disclosure order requirement as applicable to ex parte grand jury proceedings is to broaden the reach of Section 2517(3) beyond its terms and purpose.

POINT IVDISMISSAL OF THE INDICTMENT
IS NOT A PROPER REMEDYA. THE DEFENDANTS MAY NOT CHALLENGE THE
LEGALITY OF EVIDENCE SUPPORTING THEIR
INDICTMENT

Even assuming that, in connection with the grand jury proceedings, the government was required by Section 2517(5) to obtain a disclosure order but failed to do so, the Indictment should not be dismissed. This is so, in part, because a defendant may not properly challenge an indictment on the ground that tainted evidence was presented to the grand jury.

It is now well-settled that "the validity of an indictment is not affected by the character of the evidence considered" by the grand jury, or because "the grand jury acted on the basis of inadequate or incompetent evidence ...". United States v. Calandra, 414 U.S. 338, 344-345 (1974). Congress incorporated this rule into Title III. "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforceable by an individual. (Blue v. United States, 86 S.Ct. 1416, 384 U.S. 251 (1966)). There is no

intent to change this general rule." S.Rep. No. 1097, supra, at 2195. "The general rule," as illustrated in Blue, is that a defendant is not entitled to have his indictment dismissed before trial simply because the Government "acquire[d] incriminating evidence in violation of [law]," even if the "tainted evidence was presented to the grand jury." Gelbard v. United States, 408 U.S. 41, 60 (1972) (citations omitted).

Although the Seventh Circuit in Brodson articulated a contrary view, 528 F.2d at 216, Brodson, as stated before, should not be followed. Although some of the cases cited in Brodson do suggest that an indictment may be dismissed where all the evidence presented to the grand jury was obtained illegally, two of them were decided before Blue, and all but one were decided before Calandra. The post-Calandra case cited, United States v. Thompson, 493 F.2d 305, 308-09 (9th Cir.), cert. denied, 419 U.S. 834 (1974), only suggested that the deliberate use of hearsay before the grand jury where direct evidence was available might be a basis for dismissal of the indictment, but did not so hold in the particular factual circumstances. Moreover, such a holding would, as the court recognized in Thompson, limit Costello v. United States, 350 U.S. 359 (1956), a case reaffirmed in Calandra.

Therefore, even assuming that all the evidence supporting the instant indictment had been improperly presented to the grand jury, the motion to dismiss should be denied.

B. THE FAILURE TO OBTAIN AN ORDER
AUTHORIZING DISCLOSURE TO THE
GRAND JURY DOES NOT WARRANT
SUPPRESSION OF THE EVIDENCE

Assuming arguendo that the court rejects the arguments hereinbefore stated, suppression of the evidence before the grand jury would still not be warranted and the indictment should stand. The Supreme Court stated in United States v. Donovan, 97 S.Ct. 658 (1977), that suppression under Title III is required:

[O]nly for a "failure to satisfy any of those statutory requirements that directly and substantially implement the Congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary device. (97 S.Ct. at 671).

The Supreme Court in Donovan held that the failure to comply with the identification requirement of Section 2518(1)(b)(iv) and the notice requirement of Section 2518(8)(d), did not play a central role in the statutory

framework of Title III and that the failure to comply with such requirements, while they were "undoubtedly important" (97 S.Ct. at 671), does not warrant suppression. As to the central role played by the requirements for an order permitting disclosure of evidence lawfully seized, the Fifth Circuit Court of Appeals recently addressed the suppression issue in a disclosure context under Section 2517 and stated as follows:

"The section's [2515] main thrust is therefore to exclude evidence the seizure of which was in violation of the chapter, not evidence the disclosure of which was or would be in violation of the chapter." Fleming v. United States, supra, 547 F.2d at 874.

The court in Fleming considered that the criminal investigation was no pretext, that the privacy interests of the person whose conversations were intercepted was weak, and that where evidence is lawfully seized, they would order its exclusion "only if the statute clearly required that result." (547 F.2d at 874). The court then went on to state that the statutory provision providing for exclusion is not clear.

In the instant case, the intercepted telephone conversations relating to interstate telephone calls was properly presented to the grand jury pursuant to the

Section 1955 investigation. The evidence was lawfully seized and lawfully presented to the federal grand jury so that the privacy interests of the defendants in prohibiting disclosure is at least as weak as that present in Fleming. There can be no contention that the investigation and grand jury presentations were a subterfuge since an Indictment on Section 1955 issued. There accordingly is no basis to warrant the drastic remedy of suppression of the evidence before the federal grand jury in the instant case.

CONCLUSION

The Order dismissing the Indictment should be reversed.

Respectfully submitted,
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STATUTES INVOLVED

18 U.S.C. 371 provides, in pertinent part:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1084 provides, in pertinent part:

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

18 U.S.C. 1955 provides, in pertinent part:

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business receives gross revenue in excess of \$2,000 in any single day shall be deemed to have been established.

18 U.S.C. 2515 provides:

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

18 U.S.C. 2517 provides:

§ 2517. Authorization for disclosure and use of intercepted wire or oral communications

(1) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

(3) Any person who has received, by any means authorized by this chapter, any information concerning a wire or oral communication, or evidence derived therefrom intercepted in accordance with the provisions of this chapter may disclose the contents of that communication or such derivative evidence while giving testimony under oath or affirmation in any proceeding held under the authority of the United States or of any State or political subdivision thereof.

(4) No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.

(5) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

18 U.S.C. 2518 provides, in pertinent part:

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

New York Penal Law provides, in pertinent part:

§ 225.00 Gambling offenses; definitions of terms

The following definitions are applicable to this article:

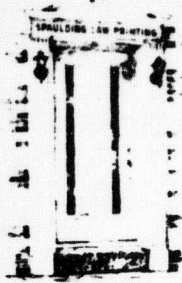
2. "Gambling." A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.

4. "Advance gambling activity." A person "advances gambling activity" when, acting other than as a player, he engages in conduct which materially aids any form of gambling activity. Such conduct includes but is not limited to conduct directed toward the creation or establishment of the particular game, contest, scheme, device or activity involved, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to participate therein, toward the actual conduct of the playing phases thereof, toward the arrangement of any of its financial or recording phases, or toward any other phase of its operation. One advances gambling activity when, having substantial proprietary or other authoritative control over premises being used with his knowledge for purposes of gambling activity, he permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

5. "Profit from gambling activity." A person "profits from gambling activity" when, other than as a player, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of gambling activity.

§ 225.05 Promoting gambling in the second degree

A person is guilty of promoting gambling in the second degree when he knowingly advances or profits from unlawful gambling activity.



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